Supreme Court, U.S.
FILED
SEP 11 1995
CLERK

No. 95-39

In the Supreme Court of the United States

OCTOBER TERM, 1995

WALTER F. JEKOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court clearly erred in determining that the conspiracy to which petitioner pleaded guilty continued after November 1, 1987.

2. Whether the district court erred in increasing petitioner's base offense level pursuant to Sentencing Guidelines § 2F1.1(b)(1) to account for the dollar value of the prescription drugs that petitioner unlawfully distributed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10, C1-C3) is unpublished, but the judgment is noted at 47 F.3d 1176 (Table). The opinion of the district court (Pet. App. B1-B68) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1995, and its opinion was amended on April 7, 1995. A petition for rehearing was denied on April 7, 1995. Pet. App. C3. The petition for a writ of certiorari was filed on July 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of California, petitioner was convicted of one count of conspiring to obtain and illegally distribute anabolic steroids, human growth hormone, and other prescription drugs, in violation of 18 U.S.C. 371. He was sentenced to 60 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A1-A10.

1. Petitioner was a licensed physician in the State of California. Between 1985 and 1991, he used his medical license to purchase prescription drugs such as anabolic steroids and human growth hormone, as well as other drugs believed to enhance athletic performance. Petitioner obtained some of the drugs from legitimate sources such as pharmacies and licensed drug wholesalers. He also made illegal purchases of anabolic steroids and human growth hormone from a variety of black market sources. Then, through his medical practice, petitioner illegally distributed and administered those drugs (which included smuggled steroids and steroids approved only for use in animals) to bodybuilders and athletes. See generally Presentence Report (PSR) ¶¶ 100-183.

In late 1987, petitioner's distribution of anabolic steroids came under the scrutiny of the California Medical Board. Petitioner settled that investigation by submitting to the Board a sworn statement in which he agreed not to "dispense, prescribe or administer anabolic steroids for the purpose of muscular development or enhancement unless, at some future time, anabolic steroids gain general acceptance in the Los Angeles medical community for such pur-

poses." PSR ¶¶ 104-110. Even after signing that declaration, however, petitioner continued to use his medical practice to distribute anabolic steroids and prescription scrips for bodybuilding purposes. He attempted to evade detection by, *inter alia*, creating false medical records and listing false diagnoses. See PSR ¶¶ 158-160. Petitioner also created a concoction called GHF #1, which he advertised as being a "non-steroid" program for bodybuilders, but which in fact contained anabolic steroids. See PSR ¶¶ 161-168.

2. a. The charge to which petitioner pleaded guilty (Count 1 of the Indictment) alleged that petitioner had participated in a conspiracy whose purpose was

> to enable the [petitioner], in the course of his business and for profit, to obtain steroids and other performance enhancing drugs from both legitimate and black market sources and to administer, dispense and distribute these drugs to athletes, body builders and others * * * for purposes of facilitating muscular and athletic development, enhancement, and appearance, and not for the treatment of a disease, all without detection by the FDA or the California Medical Board.

PSR ¶ 17; Pet. App. B4-B5. Petitioner pleaded guilty to Count 1 pursuant to a written plea agreement. He made only limited factual admissions designed to support the entry of his plea. *Id.* at B5. He admitted to participating in a conspiracy "to enable [petitioner] to obtain anabolic steroids and other performance enhancing drugs from both legitimate and black market sources." Gov't C.A. Br. 4. Petitioner further admitted to obtaining the assistance of others not authorized to deal in prescription drugs for the

purpose of purchasing "black market" anabolic steroids and other performance-enhancing drugs. Petitioner acknowledged that his conduct was designed to defraud the Food and Drug Administration (FDA) and to facilitate his receipt and sale of smuggled drugs. PSR ¶ 51; Gov't C.A. Br. 4-5.

Petitioner denied all other factual allegations in Count 1.[1] He acknowledged, however, that his limited admissions would not restrict the district court's consideration at sentencing of the entirety of his illegal conduct. Thus, the plea agreement provided that

> [petitioner] understands that the district court will not be limited in setting sentence to those specific facts to which [petitioner] admits in his plea of guilty. [Petitioner] agrees that he is pleading guilty to Count One of the Indictment, and agrees that the district court may consider as relevant conduct (if the court determines this is appropriate after hearing on the matter) facts pertaining to all aspects of the conspiracy as charged for the purposes of (1) determining whether the Sentencing Guidelines are applicable, (2) determining the applicable sentencing guideline, and (3) determining the appropriate sentence. * * *

Pet. App. B6; Gov't C.A. Br. 5.

b. The Probation Office conducted a lengthy presentence investigation, culminating in a 108-page presentence report. That report detailed how peti-

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[1] Petitioner also denied those objectives of the conspiracy that he did not admit in his written factual basis—*i.e.*, the objects relating to the distribution of misbranded prescription drugs; the distribution of steroids for reasons other than the treatment of a disease; and the distribution of unapproved new drugs received from black market sources. Pet. App. B7.

tioner, with the assistance of others, had for years been using his medical license as a cover for the illegal purchase and distribution of anabolic steroids, human growth hormone, and other performance-enhancing drugs. Gov't C.A. Br. 6-9. After petitioner filed numerous objections, the United States submitted detailed factual materials organized to correspond with, and provide a factual basis for, each paragraph of the presentence report. The district court then conducted three days of evidentiary hearings. Gov't C.A. Br. 9-11.

The district court subsequently issued a written opinion adopting the material findings contained in the presentence report. The court found that petitioner, under the guise of operating a medical practice, had engaged in a conspiracy to obtain and distribute anabolic steroids, human growth hormone, veterinary steroids, and smuggled steroids over a period of several years. The district court rejected petitioner's argument that the Sentencing Guidelines did not apply to his conduct. The court determined that "there is compelling evidence that [petitioner's] role in the conspiracy extended well beyond the overt acts to which he admitted in the plea agreement," Pet. App. B60-B61, and explained that "the Guidelines govern conspiracies that straddle [the November 1, 1987] effective date [of the Guidelines], provided that the defendant committed overt acts in aid of the conspiracy after November 1, 1987. Because [petitioner] committed overt acts after this date, the Guidelines are properly applied to this case." *Id.* at B51-B52 (citations omitted).

The district court also concluded that petitioner had "engaged in [a] variety o[f] fraudulent activities, including obtaining human growth hormone through

misrepresentations * * * and failing to disclose that GHF#1 contained steroids." Pet. App. B52. The court found that petitioner had taken numerous steps to evade detection by government agencies. Among other things, the district court concluded, petitioner had "created bogus medical records to hide the fact that he was dispensing steroids without a valid medical purpose." *Id.* at B57; see also *id.* at B52-B53.

Guidelines § 2F1.1(b)(1) provides that in sentencing for fraud offenses, the district court should increase the defendant's offense level to reflect the monetary loss caused by the fraudulent activity. Pet. App. B53. Relying on governing Ninth Circuit precedent, the court held that in cases involving fraud against government enforcement agencies, the "street value of the drugs involved" could properly be considered in applying Guidelines § 2F1.1(b)(1). Pet. App. B54 (citing *United States* v. *Cambra*, 933 F.2d 752, 756 (9th Cir. 1991)). The court found that the monetary value of the drugs illegally distributed was in excess of $200,000, and on that basis it increased petitioner's offense level by eight levels. Pet. App. B56.[2]

3. The court of appeals affirmed. Pet. App. A1-A10. The court first upheld the district court's decision to apply the Sentencing Guidelines, explaining that "[t]he district court's finding that [petitioner's] conspiracy continued until February 1991 * * * is not clearly erroneous. Although [petitioner's] plea statement admitted only to illegal conduct occurring prior to 1987, the PSR contained overwhelming evidence that [petitioner] continued to commit overt acts in

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[2] The presentence report had estimated that value as being in excess of $880,000, and had recommended an enhancement of 11 levels. See Pet. App. B11.

furtherance of the conspiracy until February 1991." *Id.* at A3-A4. The court of appeals also rejected petitioner's challenges to the manner in which the Guidelines had been applied. *Id.* at A7. The court noted, *inter alia*, that "[t]he district court properly applied § 2F1.1, the fraud guideline, because [petitioner] pleaded guilty to a conspiracy count which included allegations of fraud. [Petitioner] challenged the government's factual allegations at his sentencing hearing, and the district court found the factual allegations of fraud to be true. This finding is not clearly erroneous." *Id.* at A7-A8.

ARGUMENT

1. Petitioner contends (Pet. 20-34) that the district court erred in sentencing him under the Sentencing Guidelines because it failed to make a factual finding that the conspiracy to which he pleaded guilty continued after the November 1, 1987, effective date of the Guidelines. That factbound claim is incorrect, raises an issue of no continuing importance, and does not warrant this Court's review.

As petitioner acknowledges (Pet. 23, 32-33), the Sentencing Guidelines are applicable to conspiracies that began before November 1, 1987, but continued after that date. See, *e.g.*, *United States* v. *Morgano*, 39 F.3d 1358, 1369 (7th Cir. 1994), cert. denied, 115 S. Ct. 2559 (1995); *United States* v. *Dale*, 991 F.2d 819, 853-854 (D.C. Cir.) (citing cases), cert. denied, 114 S. Ct. 286 (1993). The court of appeals upheld the district court's decision to apply the Guidelines, explaining that "[t]he district court's finding that [petitioner's] conspiracy continued until February 1991 * * * is not clearly erroneous." Pet. App. A3-A4. Petitioner argues that in fact the district court

made no such finding. In petitioner's view (see Pet. 23, 30-32), the district court found only that his *unlawful conduct* continued after November 1, 1987—not that the *conspiracy* extended past that date. That argument is without merit.

In holding that petitioner's offense was governed by the Sentencing Guidelines, the district court explained that "the Guidelines govern conspiracies that straddle [the November 1, 1987] effective date [of the Guidelines], provided that the defendant committed overt acts in aid of the conspiracy after November 1, 1987. Because [petitioner] committed overt acts after this date, the Guidelines are properly applied to this case." Pet. App. B51-B52 (citations omitted). The court thus clearly recognized that application of the Guidelines was appropriate only if the conspiracy remained in existence after November 1, 1987; viewed in context, its finding that petitioner "committed overt acts after this date" can only be regarded as a finding that petitioner committed overt acts in furtherance of a continuing conspiracy.

Questions concerning a conspiracy's duration and scope are highly fact-based. See *Blumenthal* v. *United States*, 332 U.S. 539, 554-559 (1947). When the applicability of the Sentencing Guidelines depends upon the resolution of such questions, the courts of appeals uniformly agree that the pertinent factual determination is to be made by the district court and reviewed under a clearly erroneous standard. See, *e.g.*, *Morgano*, 39 F.3d at 1369-1371; *Dale*, 991 F.2d at 854; *United States* v. *Underwood*, 932 F.2d 1049, 1053-55 (2d Cir.), cert. denied, 502 U.S. 942 (1991). Noting that "the PSR contained overwhelming evidence that [petitioner] continued to commit overt acts in furtherance of the conspiracy until February 1991," Pet.

App. A4, the court of appeals correctly declined to disturb the district court's decision to apply the Guidelines.[3] That factbound holding does not warrant this Court's review.

2. Petitioner contends (Pet. 35-40) that the district court's decision to increase his base offense level pursuant to Guidelines § 2F1.1(b)(1) was improper because "in cases of fraud against the FDA * * * no upward adjustment for 'loss' is appropriate." Pet. 36. Petitioner relies (see Pet. 37) on *United States* v. *Chatterji*, 46 F.3d 1336 (4th Cir. 1995), and *United States* v. *Andersen*, 45 F.3d 217 (7th Cir. 1995). In those cases the courts of appeals held that, absent actual or intended pecuniary injury to consumers, competitors, or the government, there could be no "loss" justifying application of Guidelines § 2F1.1-(b)(1). Petitioner's claim does not warrant further review.

Even under the approach employed in *Chatterji* and *Andersen*, Guidelines § 2F1.1(b)(1) would be applicable on the facts of this case. Unlike those cases, in

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[3] The district court's determination that the conspiracy extended past November 1, 1987, was amply supported by the record. Pursuant to the plea agreement, petitioner admitted that "in [agreeing] with other individuals to provide him with black market steroids and other performance enhancing drugs, [petitioner] was engaged in a conspiracy to commit various federal crimes." PSR ¶ 51. Although petitioner's admissions concerning the receipt of black market steroids were limited to conduct occurring before November 1, 1987, see PSR ¶¶ 52-53, the Probation Office concluded that those activities continued after that date. See PSR ¶ 177 ("From approximately June 1988 through approximately June 1989, Barry Voorhees * * * admitted to selling [petitioner] black market steroids * * * "), PSR ¶ 181 (noting that black market steroids were recovered during an August 1990 search of petitioner's home).

which the sole harm proved was impairment of the government's regulatory efforts, the present case involves deception of individual consumers and consequent pecuniary injury to them. The district court found that petitioner's fraudulent conduct included "failing to disclose [to consumers] that GHF#1 contained steroids." Pet. App. B52; see also *id.* at B57-B58 ("because [petitioner] dispensed GHF#1 to a large number of people without informing them that it contained steroids, [petitioner's] scheme had more than one victim") (citation omitted). That finding would justify application of Guidelines § 2F1.1(b)(1) even under the standard employed by the Fourth and Seventh Circuits. Compare *Chatterji*, 46 F.3d at 1342 ("We have little doubt that economic loss would exist" where "a drug with fraudulently-obtained FDA approval harms consumers, fails to produce its intended effects, or is something less than it is represented to be."); cf. *Andersen*, 45 F.3d at 221 (Guidelines § 2F1.1(b)(1) inapplicable where defendant's "customers appear to have been well aware that the drugs they were purchasing were not approved by the FDA").[4] Whether or not the full extent of the loss enhancement imposed on petitioner could be sustained

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[4] Petitioner admitted that he gave approximately 100 individuals injections of the GHF #1 concoction without disclosing to them that the advertised "NON-STEROID" concoction actually contained anabolic steroids. PSR ¶ 209. Those unwitting individuals actually received monthly dosages of steroids in their GHF #1 injections that approached "the manufacturer's recommended monthly dose, a level at which responsible physicians would supervised [*sic*] patients carefully for possible effects." Pet. App. B49. Petitioner failed to provide such monitoring, however, thereby placing those individuals' health at risk. *Id.* at B39, B41, B49, B59.

on that basis is not a question worthy of this Court's review.

In any event, as this Court recognized in *Braxton* v. *United States*, 500 U.S. 344, 348 (1991), the United States Sentencing Commission is charged by statute with the duty "periodically [to] review and revise" the Guidelines, 28 U.S.C. 994(*o*), and has power to determine whether and to what extent its amendments will have retroactive effect, 28 U.S.C. 994(u). Any conflict in approach between the decision in this case and those in *Chatterji* and *Andersen* is for the Sentencing Commission to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1995